Supreme Court, U.S.
FILED

No. 10-536 OCT 18 2010

IN THE OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES

DONALD J. MCGUIRE,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. What standard applies to determine whether due process is violated by forcing to trial a criminal defendant who has been denied a fair opportunity to defend himself or herself due to extensive pre-charging delay.

2. Whether a criminal defendant's due process rights mandate recusal of an elected state supreme court justice who successfully campaigned on a platform of siding with law enforcement over those accused of crime.

PARTIES IN COURT BELOW

Other than the present Petitioner and Respondent, there were no other parties in the Wisconsin Supreme Court.

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No. 11-__

IN THE
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DONALD J. MCGUIRE,
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vs.
STATE OF WISCONSIN,
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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

PETITION FOR WRIT OF CERTIORARI

Petitioner Donald J. McGuire respectfully requests that the Court issue a writ of certiorari to review the judgment of the Supreme Court of Wisconsin affirming his judgment of conviction on direct appeal.

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court, *State v. McGuire,* 2010 WI 91, ___ Wis.2d ___, 786 N.W.2d 227, is in Appendix A. Appendix B is that Court's unpublished Order of March 1, 2010, "not grant[ing]" McGuire's motion to recuse the Hon. Michael J. Gableman due to a 3-3 tie vote.

Appendix C is the Wisconsin Court of Appeals' unpublished decision of May 20, 2009, *State v. McGuire*, 320 Wis. 2d 482, 769 N.W.2d 877 (Appeal No. 2007AP002711 - CR).

Appendix D is the state circuit court's unpublished Order denying McGuire's post-conviction motion. Appendix E is the transcript excerpt of that court's oral ruling denying that part of McGuire's motion alleging violation of due process due to pre-charging delay.

JURISDICTION

The Wisconsin Supreme Court entered judgment on July 20, 2010. This Court's jurisdiction is invoked under 28 U.S.C. §§1257(a) & 2101(d) and Supreme Court Rule 13.1. As he did below, McGuire asserts the deprivation of his rights secured by the Due Process Clause of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition concerns the construction and application of the Due Process Clause of the Fourteenth Amendment to the United States Constitution which provides:

> No state shall ... deprive any person of life, liberty, or property, without due process of law....

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

On February 7, 2005, the State of Wisconsin filed a two-count criminal complaint against Fr. Donald J. McGuire, alleging that he had taken "indecent liberties" with two children in Fontana, Wisconsin between the fall of 1966 and the end of December, 1968. *See* Wis. Stat. §944.11(2) (1965). The state subsequently added three additional counts of indecent liberties involving V.H.B.

V.H.B. was a student at Loyola Acadamy in Illinois at the time and McGuire was a Jesuit and teacher at the school. According to V.H.B., he and McGuire traveled to V.H.B's uncle's cottage in Fontana, Wisconsin and, while there, McGuire rubbed his hands across V.H.B.'s genitals over his clothes. S.P.C. similarly alleged that, while he was a student at Loyola Academy, he and McGuire traveled to the same cottage in Fontana, Wisconsin and, while there,

participated in mutual masturbation. Both V.H.B. and S.P.C. also alleged that, at different times, each had secretly shared McGuire's room with him in the Jesuit quarters at Loyola Academy for a number of months, during which time they participated in various sexual activities with him. At the time of the alleged offenses, V.H.B. and S.P.C. each was 14 or 15 years old.

The jury convicted McGuire, and the circuit court sentenced him to seven years incarceration and 20 years of probation.

McGuire's post-conviction motion as part of his direct appeal alleged, *inter alia*, that the nearly 40-year delay in filing the charges violated his constitutional right to due process.

Following an evidentiary hearing, the circuit court denied McGuire's motion on the grounds that McGuire could not show the bad-faith action by the state as required by controlling Wisconsin precedent in *State v. Wilson*, 149 Wis. 2d 878, 440 N.W.2d 534 (1989). App. E:2; App. D:1.

As pertinent here, McGuire raised the same claims on appeal and, on May 20, 2009, the Wisconsin Court of Appeals affirmed McGuire's conviction and the denial of his post-conviction motion, again on the grounds that *Wilson*, *supra* controlled.. App. C:6-7.

The Wisconsin Supreme Court granted discretionary review on September 10, 2009.

On October 2, 2009, McGuire moved for recusal

of Justice Michael J. Gableman on statutory and constitutional grounds based on the fact that (1) Justice Gableman had based his campaign for election to the Wisconsin Supreme Court upon an agenda of promoting himself as a faithful ally of law enforcement and the prosecutorial arm of state government while denigrating both the legal rights of those accused of crimes and their counsel, (2) Justice Gableman defended against a judicial ethics complaint against him in part on the grounds that attorneys who previously represented those charged with crimes are unqualified to sit on the Supreme Court and that, by zealously representing such clients, those attorneys demonstrate a willingness to "subvert our system of . . . bringing criminals into account," and (3) Candidate Gableman received an estimated $3 million in support (representing more than 80% of the total spending in support of Gableman's candidacy) from third-party special interests in the form of advertisements promoting the same type of pro-prosecution/anti-defendant agenda.[1]

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[1] McGuire supported his motion with both documentary and digital attachments establishing the following:

1. Candidate Gableman's repeated attacks on his opponent for "siding with criminals;"
2. Candidate Gableman attacked as inappropriate his opponent's compliance with his ethical obligation to zealously represent his clients as a public defender;

(continued...)

On March 1, 2010, the Wisconsin Supreme Court issued an Order "not grant[ing]" McGuire's motion to recuse the Hon. Michael J. Gableman, due to a 3-3 tie vote on the issue and referencing that Court's similar vote reflected in its competing opinions in *State v. Allen*, 2010 WI 10, 322 Wis.2d 372, 778 N.W.2d 863.

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[1](...continued)

3. Candidate Gableman's repeated labeling of basic constitutional and legal rights as "loopholes" or "technicalities;"
4. Candidate Gableman's repeated emphasis on his prior role as a prosecutor, as opposed to his opponent's prior role as a public defender, to promote the theme that Candidate Gableman could be counted upon to continue supporting the prosecution rather than "criminals" as Justice Gableman;
5. Candidate Gableman's failure to repudiate the $3 million worth of third-party attack ads (representing more than 80% of the spending in support of Gableman's candidacy) that repeatedly labeled basic constitutional rights as "loopholes" or "technicalities," attacked Justice Butler as "siding with criminals," and called upon Butler to "provide justice for victims, not criminals," while simultaneously promoting Gableman as a trusted "ally" of law enforcement who was waging his own "war on crime;"
6. Candidate Gableman's emphasis on his record as a judge who is "tough on crime;"
7. Candidate Gableman's repeated emphasis on his support from law enforcement in the context of his overriding pro-prosecution/anti-defendant/anti-defense counsel campaign agenda.

App. B:1-2. In *Allen*, three justices concluded that Allen's allegations were sufficient to require briefing and oral argument on the issue of recusal and that the remaining justices had not only the authority, but the obligation to rule on the due process issue presented. *Allen*, 2010 WI 10, ¶¶9-193. The remaining three justices concluded that only the justice in question, and not the Wisconsin Supreme Court as a whole, had authority to decide the due process question of recusal and that the allegations did not support recusal in any event because, in their view, due process does not protect one of a class of individuals against which the judge evidences bias and because this Court's decision in *Caperton v. A. T. Massey Co., Inc.*, 129 S.Ct. 2252 (2009), should be limited to its specific facts. *Allen*, ¶¶ 194-272.

On July 20, 2010, the Wisconsin Supreme Court issued its decision on the merits of McGuire's appeal. App. A. As relevant here, the Court held that pre-charging delay does not violate due process unless the delay caused actual prejudice and resulted from an improper state motive, such as to give the state a tactical advantage over the defendant. App. A:20-25 (¶¶45-52). Because it was the complainants who chose to delay reporting the alleged offenses for more than 30 years, McGuire could not meet this test. App. A:25-27 (¶¶53, 56). The Court also concluded that the deaths of nearly all of the witnesses who could rebut the complainants' allegations and support McGuire's defense, and the destruction of the physical evidence necessary to support that defense, did not constitute

"actual prejudice." App. A:25-27 (¶¶53-56).

REASONS FOR ALLOWANCE OF THE WRIT

I.

SUPREME COURT REVIEW IS APPROPRIATE TO CLARIFY WHEN PRE-CHARGING DELAY VIOLATES DUE PROCESS

Rarely, outside of homicide cases, is a defendant called upon to account for his actions and defend against charges that allegedly occurred nearly four decades earlier. The obstacles to preparing and presenting such a defense are enormous. *See Stogner v. California*, 539 U.S. 607, 631 (2003) (delay "can plague child abuse cases, where recollection after so many years may be uncertain, and 'recovered' memories faulty . . .." (citation omitted)).

This case exemplifies the concerns noted in *Stogner*. The allegations concern incidents that supposedly took place between 1967 and 1968, some 36 years or more before the criminal complaint was filed in February, 2005. The complainants did not even report their allegations to the police until the fall of 2003, after seeking to file a civil suit for money damages. As a result of this delay, McGuire was denied the testimony of almost all of the witnesses who would be able to corroborate his defense that the

complainants' allegations here were not truthful. The nearly 40-year delay in bringing these charges has made it impossible to determine whether those charges are based in fact, in fantasy, or in fraud.

The vast majority of witnesses who would have corroborated McGuire's defense and rebutted the complainants' assertions are dead. The other Jesuits who shared the same floor of the Jesuit living quarters at Loyola Academy with McGuire, and who would have confirmed the layout of McGuire's room and the fact that the complainants could not have lived there with him undetected, are dead. They also attended meetings involving S.P.C. resulting in his transfer to a different school, and would have been able to confirm what S.P.C. actually said and the fact that a search of McGuire's room rebutted S.P.C's allegations.

Dr. Harry Bender, who owned the cottage in Fontana and would have confirmed that he never gave McGuire keys to the cottage or allowed McGuire to use it when he was not there, is also dead. The Loyola Academy records detailing such things as the use of fleet vehicles and the dates and reasons for Jesuit absences from the school, records that would have rebutted the complainants' allegations regarding events at Fontana, have been destroyed. John Gooch, who helped McGuire at the school and whom the complainants claimed knew of their involvement with McGuire but who in fact would confirm the absence of such involvement, also is dead.

The charges here were possible only because

Wisconsin's usual six-year statute of limitations is tolled while the defendant is outside the state, as McGuire was through nearly all the intervening time period. Wis. Stat. §939.74; *see State v. MacArthur*, 2008 WI 72, 310 Wis.2d 550, 750 N.W.2d 910. The question remains, however, whether the 36+ year delay and resulting damage to McGuire's right to present a defense violates due process even though authorized by the limitations statute.

Although the applicable statute of limitations "'provide[s] the primary guarantee against bringing overly stale criminal charges,'" *United States v. Lovasco*, 431 U.S. 783, 789 (1977) (citation omitted), it is not the only standard when considering the due process consequences of such a delay. *Id.* Yet, despite two attempts by this Court to provide guidance regarding the applicable standards for assessing when pre-charging delay violates due process, *Lovasco*, *supra*; *United States v. Marion*, 404 U.S. 307 (1971), confusion and conflict still reign in the lower courts on that score.

Many, like the Wisconsin Supreme Court here, require a showing of governmental misconduct as a predicate for a due process challenge to pre-charging delay. App. A:20-26 (¶¶45-56). Others, however, balance the prejudicial effects of the delay against the reasons for it. Courts taking each position cite to this Court's precedents for support.

A. This Court's Precedents

In *United States v. Marion*, 404 U.S. 307 (1971), the appellees claimed that their due process and speedy trial rights were violated due to the prosecutor's negligence or indifference in investigating the case and presenting it to a grand jury, resulting in a four year delay between the offense and the indictment. *Id.* at 310. In rejecting their contentions, this Court found that their due process claims were speculative and premature because they had not shown actual prejudice as opposed to possible prejudice. *Id.* at 326. The government conceded that due process would require dismissal where pre-charging delay causes "substantial prejudice to appellees' rights to a fair trial and . . . the delay was an intentional device to gain tactical advantage over the accused." *Id.* at 324. However, the Court expressly refused to "determine when and in what circumstances actual prejudice resulting from preaccusation delays requires the dismissal of the prosecution." *Id.*

In *United States v. Lovasco*, 431 U.S. 783 (1977), the Court rejected a claim that a pre-indictment delay of 18 months resulting from an on-going investigation violated due process. *Id.* at 785-86, 796-97. Rejecting the suggestion that "due process bars prosecution whenever a defendant suffers prejudice as a result of preindictment delay," *id.* at 789, the Court cited *Marion* for the proposition that "proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry

must consider the reasons for the delay as well as the prejudice to the accused." *Id.* at 790. Rather, the question is whether "compelling the [defendant] to stand trial" under the circumstances "violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions.'" *Id.* (citations omitted).

Applying this standard, the Court concluded that "fundamental conceptions of justice" did not require charges as soon as the government had sufficient proof to convict. *Id.* at 790-96.

The Court noted again with approval the government's concession that a tactical delay intended to prejudice the defense would violate due process, as well as the government's additional concession that "'[a] due process violation might also be made out upon a showing of prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense.'" *Id.* at 795 fn.17 (quoting government's brief).

However, the Court once again did not hold that either improper motive or reckless disregard is required for a due process violation. Indeed, the Court reaffirmed its prior statements in *Marion* that the due process inquiry must be flexible and depend on the particular circumstances of each case, and again refused to "determine in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions." *Lovasco,* 431 U.S. at 796-97.

While *Marion* and *Lovasco* declined to determine what reasons for prejudicial pre-charging delay would violate due process, subsequent *dicta* in *United States v. Gouveia*, 467 U.S. 180 (1984), suggest that it already had limited due process to cases of improper tactical delay.

The narrow issue in *Gouveia* was whether the respondents were entitled to appointed counsel while they were in administrative segregation preceding initiation of formal adversarial judicial proceedings. While discussing why the Sixth Amendment right to counsel does not attach prior to the initiation of formal proceedings, the Court noted in *dicta* that "the Fifth Amendment requires the dismissal of an indictment . . . if the defendant can prove the Government delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense." *Gouveia*, 467 U.S. at 192.

Was this language intended to resolve the questions left open in *Marion* and *Lovasco*? Unlikely, given that the Court cited *Marion* and *Lovasco* in support of that assertion. After all, except in extraordinary circumstances, due process focuses on the fairness of the trial rather than the bad faith of the prosecutor. *E.g.*, *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (prosecutor's failure to disclose exculpatory evidence "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"). The

principle of due process

> is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.

Id. at 87.

More likely, the *Gouveia dicta* merely reflect "the established outer contours of unconstitutional preindictment delay," *Howell v. Barker*, 904 F.2d 889, 894 (4th Cir. 1990), a non-exclusive example of the type of facts where a due process claim most certainly would succeed rather than an immutable requirement for establishing a due process violation based on pre-charging delay.

B. Confusion and Conflict in the Lower Courts

Although this Court expressly declined to require a showing of improper government motive in *Marion* and *Lovasco*, the lower courts remain in conflict regarding what, if anything, beyond such a motive and resulting prejudice would support a due process claim due to pre-charging delay.

A number of courts limit application of due process to cases consistent with the government's concession in *Marion* and the *dicta* in *Gouveia*, i.e.,

where the defendant shows actual prejudice resulting from pre-charging delay intentionally caused by the government to gain a tactical advantage.[2]

Others note that *Lovasco's* actual statement of the applicable due process standard requires a balancing of the degree of actual prejudice to the defense against the reasons for the delay, *see Lovasco*, 431 U.S. at 790, and that the Court has never held that

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[2] *E.g.*, *United States v. McClure*, 473 F.2d 81, 82 (D.C. Cir. 1972); *United States v. Bater*, 594 F.3d 51, 54 (1st Cir. 2010); *United States v. Cornielle*, 171 F.3d 748, 752 (2nd Cir. 1999); *United States v. Sebetich*, 776 F.2d 412, 430 (3rd Cir. 1985); *Woodfox v. Cain*, 609 F.3d 774, 804 (5th Cir. 2010); *United States v. Wright*, 343 F.3d 849, 859 (6th Cir. 2003); *United States v. Gladney*, 474 F.3d 1027, 1030 (8th Cir. 2007); *United States v. Comosona*, 848 F.2d 1110, 1113 (10th Cir. 1988); *United States v. Foxman*, 87 F.3d 1220, 1222 (11th Cir. 1996); *Coleman v. Lofton*, 289 Ark. 573, 576, 715 S.W.2d 435, 437 (1986); *State v. Morrill*, 197 Conn. 507, 522, 498 A.2d 76, 86 (1985); *Coker v. State*, 185 Ga.App. 103, 103, 363 S.E.2d 356, 357 (Ga. App. 1987); *State v. Kruse*, 100 Idaho 877, 879, 606 P.2d 981, 983 (1980); *Kirk v. Commonwealth*, 6 S.W.3d 823, 826 (Ky. 1999); *Commonwealth v. Patten*, 401 Mass. 20, 21, 513 N.E.2d 689, 690 (1987); *People v. Crear*, 242 Mich. App. 158, 166, 618 N.W.2d 91, 96 (2000); *State v. F. C. R.*, 276 N.W.2d 636, 639 (Minn. 1979); *State v. Scott*, 621 S.W.2d 915, 917 (Mo. 1981); *Gonzales v. State*, 111 N.M. 363, 365-66, 805 P.2d 630, 632, 633 (1991); *State v. Davis*, 46 N.C.App. 778, 781-82, 266 S.E.2d 20, 23-24 (N.C. App. 1980); *State v. Dike*, 91 Or.App. 542, 544, 756 P.2d 657, 658 (Or. App. 1988); *Commonwealth v. Grazier*, 391 Pa. Super. 202, 208-209, 570 A.2d 1054, 1056-57 (1990); *Ibarra v. State*, 11 S.W.3d 189, 193 (Tex. Crim. App. 1999); *State v. Wilson*, 149 Wis. 2d 878, 904-05, 440 N.W.2d 534, 544 (1989).

improper governmental motive for pre-charging delay is a prerequisite to a due process violation.[3]

The Seventh Circuit has come down squarely on both sides of the issue. *Compare United States v. Wallace*, 326 F.3d 881, 886 (7th Cir. 2003) (requiring actual prejudice and improper governmental purpose in causing the delay), *with United States v. Canoy*, 38 F.3d 893, 902 (7th Cir. 1994) (noting resolution of the inner-circuit conflict in favor of balancing of prejudice against reasons for delay).

The Tennessee Supreme Court likewise has issued conflicting decisions on the question. *Compare State v. Utley*, 956 S.W.2d 489, 495 (Tenn. 1997) (requiring substantial prejudice resulting from

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[3] *E.g.*, *United States v. Uribe-Rios*, 558 F.3d 347, 358 (4th Cir. 2009); *Howell*, *supra*; *United States v. De Jesus Corona-Verbera*, 509 F.3d 1105, 1112 (9th Cir. 2007); *State v. Mouser*, 806 P.2d 330, 336 (Alaska App. 1991); *People v. Catlin*, 26 Cal.4th 81, 107, 26 P.3d 357 (2001) (applying balancing under state constitution); *Barber v. State*, 438 So.2d 976, 978 (Fla. App. 1983); *State v. Higa*, 102 Hawai'i 183, 187, 74 P.3d 6, 10 (2003); *People v. Valenzuela*, 180 Ill.App.3d 671, 674, 536 N.E.2d 160, 165, 129 Ill.Dec. 476, 479 (Ill. App. 1989); *State v. Taylor*, 289 Mont. 63, 68-69, 960 P.2d 773, 776 (1998); *State v. Knickerbocker*, 880 A.2d 419, 422-223 (N.H. 2005); *People v. Decker*, 13 N.Y.3d 12, 14-15, 912 N.E.2d 1401 (2009) (applying balancing under state constitution); *State v. Weisz*, 356 N.W.2d 462, 464 (N.D. 1984); *State v. Luck*, 15 Ohio St.3d 150, 153-54, 472 N.E.2d 1097 (1984); *State ex rel. Knotts v. Facemire*, 678 S.E.2d 847, 855 (W.Va. 2009). *See also State v. Wilson*, 149 Wis.2d 878, 909-12, 440 N.W.2d 534, 546-49 (1989) (Heffernan, Ch.J. dissenting).

intentional delay designed to gain tactical advantage over the accused), *with State v. Gray*, 917 S.W.2d 668, 673 (Tenn. 1996) (42-year delay in reporting alleged sexual assault of a minor caused actual prejudice and violated due process).

This is not a new conflict. Justice White noted it as early as 1988. *Hoo v. United States*, 484 U.S. 1035-36 (1988) (White, J. dissenting from denial of certiorari). Nothing has changed to resolve the conflict since then.

The Wisconsin Supreme Court's decision conflicts with this Court's decision in *Lovasco*. It also conflicts with the decisions of several other state and federal courts and reflects a general state of confusion among the lower courts regarding the proper standard to apply in assessing whether precharging delay violates due process. Such conflict and confusion existed in 1988 and remain today, demonstrating no reason to believe that any uniform standard will soon develop absent intervention by this Court.

This case therefore presents the type of compelling reasons generally required for the grant of certiorari. *See* Sup. Ct. R. 10(b)&(c).

II.

SUPREME COURT REVIEW IS APPROPRIATE TO CLARIFY THE INTERACTION BETWEEN THE JUDGE'S RIGHT TO FREE SPEECH AND THE DEFENDANT'S RIGHT TO A FAIR AND UNBIASED DECISION-MAKER

Wisconsin, like at least 38 other states, chooses to elect the judges of its supreme court, court of appeals, and circuit courts by popular vote. Wis. Const. art. VII, §§4, 5, 7. Consequently, judicial candidates are given wide latitude under the First Amendment to announce their political views and ideology in an effort to win the approval of ordinary voters. *Republican Party of Minnesota v. White*, 536 U.S. 765, 787-88 (2002).

At the same time, however, the necessity of judicial election campaigns produces "[a] fundamental tension between the ideal character of the judicial office and the real world of electoral politics." *Chisom v. Roemer*, 501 U.S. 380, 400 (1991). After all, "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *United States v. Mistretta*, 488 U.S. 361, 407 (1989).

"Impartiality" in this sense "is the lack of bias for or against either *party* to the proceeding." *White*, 536

U.S. at 775-76.[4] It was Justice Gableman's demonstrated partiality, or at least serious probability of partiality, *for* one party to litigation and *against* the other that formed the basis for McGuire's recusal motion. *Cf. White*, 536 U.S. at 777 fn.7 (judicial candidate's "election speech stressing the candidate's unbroken record of affirming convictions for rape" "may well exhibit a bias against parties").

This Court made clear in *White* that preserving the impartiality of the courts, in the sense of neutrality as between parties to litigation, is a valid basis on which to restrict otherwise protected speech. 536 U.S. at 775-76. Still, the Court more recently noted that the key to resolving this tension between the judge's First Amendment rights and the litigants' rights to an unbiased judge is not to silence the speaker, but recusal. *Citizens United v. Federal Election Com'n*, ___ U.S. ___, 130 S.Ct. 876, 910 (2010).

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). "A neutral and detached judge" is an essential component of this due process requirement. *Ward v. Vill. of Monroeville*, 409 U.S. 57, 62 (1972).

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[4] In *White*, the Court distinguished between impartiality *vis-a-vis* parties, the preservation of which it viewed as a legitimate and compelling state interest, and state interests in preserving impartiality *vis-a-vis* legal views or open-mindedness, which it did not view as compelling. 536 U.S. at 775-84.

See also Johnson v. Mississippi, 403 U.S. 212, 216 (1971) ("Trial before an 'unbiased judge' is essential to due process"). Due process thus "ensur[es] that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

Moreover, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). Thus, "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968). *See also Withrow v. Larkin*, 421 U.S. 35, 47 (1975) ("Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness'" (citation omitted)); *Murchison*, 349 U.S. at 136 (holding that "to perform its high function in the best way justice must satisfy the appearance of justice" (internal quotation marks omitted)); *Peters v. Kiff*, 407 U.S. 493, 502 (1972) ("even if there is no showing of actual bias in the tribunal, . . . due process is denied by circumstances that create the likelihood or the appearance of bias"). The "inquiry must be not only whether there was actual bias on [the judge's] part, but also whether there was 'such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance . . ..'" *Taylor v. Hayes*, 418 U.S. 488, 501

(1974) (citation omitted).

Most recently, this Court in *Caperton v. A. T. Massey Co., Inc.*, 129 S.Ct. 2252 (2009), reaffirmed the principle that due process is violated, not only where the judge is actually or subjectively biased in favor of one party to litigation or against another, but also where there exists, as here, an impermissible likelihood or reasonable appearance of such bias. The Court there held that due process required recusal of a judge where, even in the absence of actual prejudice or bias, the circumstances created "a serious risk of actual bias-based on objective and reasonable perceptions." *Id.* at 2263.

> The court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is "likely" to be neutral, or whether there is an unconstitutional "potential for bias."

Id. at 2262.

Caperton also makes clear that the due process right to an unbiased judge does not turn solely on the judge's own perception of whether the circumstances create an impermissible likelihood or reasonable appearance of bias. Rather, *Caperton* reflects the Court's obligation to conduct an independent, objective evaluation of the circumstances to assess the likelihood or appearance of bias.

> The difficulties of inquiring into actual bias, and the fact that the inquiry is often

> a private one, simply underscore the need for objective rules. Otherwise there may be no adequate action against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias.

129 S. Ct. at 2263 (citations omitted).

Whether phrased in terms of actual bias, probability of bias, or appearance of bias, due process mandates recusal where the circumstances are as extreme as they are here. This is not a case where a litigant seeks to infer bias from a few statements taken out of context or from contributions to a candidate that are minimal in the context of the campaign as a whole. Rather, recusal is mandated here as a matter of due process because Candidate Gableman's entire campaign was focused on (1) portraying the appearance of a judge who will support the prosecution over the defense in criminal cases and (2) portraying attorneys who represent those accused of crimes or judges who uphold the legal rights of those accused of crimes as

somehow acting improperly.[5] This is exactly the type of bias (or probability of bias) in favor of one party to litigation and against the other that due process prohibits. *Caperton*, 129 S.Ct. at 2257 (failure to recuse violates due process where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable"(citation omitted)); *see White*, 536 U.S. at 775-76 & fn.7.

Given the circumstances of this case, "might not a defendant with reason say that he feared he could not get a fair [hearing] from one who would have so strong a motive" not to provide him one?" *Tumey v. Ohio*, 273 U.S. 510, 533 (1927). The resulting strong probability or appearance of bias (if not actual bias) in favor of the party to this litigation with whom then-Candidate Gableman chose to ally himself so closely and vigorously during the campaign, and against a class of litigant he as vigorously sought to demonize, mandates recusal as a matter of due process because McGuire otherwise cannot "present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v. Jerico, Inc.*, 446 U.S. 238, 242 (1980).

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[5] Although votes on particular cases do not themselves demonstrate bias, the fact that Justice Gableman has yet to vote to reverse a single criminal conviction despite two years on the Wisconsin Supreme Court shows that nothing he has done since his election nullifies the effect of his pro-prosecution - anti-defendant campaign agenda.

Although the standards reaffirmed in *Caperton* appear clear, the Wisconsin Supreme Court's competing opinions on the recusal issue in *Allen*, incorporated into its order "not grant[ing]" McGuire's motion to recuse the same justice in this case, suggest a need for further guidance from this Court.

For instance, although three of the Wisconsin justices would have applied federal due process standards under *Caperton* to the facts of this case, the three justices opposing recusal here concluded that due process does not apply because the expressions of bias demonstrated in McGuire's motion apply to a class of litigants, criminal defendants, rather than to McGuire alone. *Allen*, 2010 WI 10, 778 N.W.2d 863, ¶¶234-35. While this Court has held that "general frustration with insurance companies," a frustration shared by many, would not support a due process requirement of recusal, *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 820-21 (1986), it established no categorical exception from the protections of due process for individual members of a class against whom a judge is actually or probably biased. The "risk of actual bias-based on objective and reasonable perceptions," 129 S.Ct. at 2263, is no less strong when the bias is class-based rather than attributable to the individual characteristics of the litigant. A racist, sexist, or homophobic judge is no less biased for lack of personal knowledge of the particular minority, woman, or gay appearing before him.

Review also is appropriate to resolve the

fundamental dispute between the majority and dissenting justices in *Caperton* regarding whether the "probability of bias standard is somehow limited to financial support in judicial elections, or applies to judicial recusal questions more generally." 129 S.Ct. at 2269. Indeed, one of the Wisconsin justices opposing recusal sought to limit *Caperton* to its specific financial facts, while ignoring the more general constitutional standards for recusal. *Allen*, *supra* at ¶¶259-72.

Review by this Court of the Wisconsin Supreme Court's three to three decision to "not grant[]" McGuire's motion to recuse Justice Gableman therefore is appropriate on either of two grounds. If, as McGuire believes, it is the constitutional principles in *Caperton* that control, then review is appropriate because the state court's non-decision conflicts with this Court's decisions. *See* Sup. Ct. R. 10(c). If, however, the *Caperton* dissenters are correct that it remains an open question regarding whether those principles apply outside the unique facts of that case, 129 S.Ct. at 2269, then review is appropriate to decide "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

CONCLUSION

For the reasons stated, the Court should grant a writ of certiorari to review the decision of the Wisconsin Supreme Court.

Dated at Milwaukee, Wisconsin, October 14, 2010

Respectfully submitted,

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McGuire Cert.wpd

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APPENDIX A

2010 WI 91
STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2007AP2711-CR
(L.C. No. 2005CF80)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONALD J. MCGUIRE,

Defendant-Appellant-Petitioner.

July 20, 2010

REVIEW of a decision of the Court of Appeals. *Affirmed.*

¶1 DAVID T. PROSSER, J. This is a review of an unpublished decision of the court of appeals, *State v. McGuire,* No.2007AP2711-CR, unpublished slip op., 2009 WL 1393403 (Wis.Ct.App. May 20, 2009), affirming a judgment of the Walworth County Circuit Court, James L. Carlson, Judge. Father Donald J. McGuire (McGuire) was charged in 2005 with five counts of indecent behavior with a child, in violation of

Wis. Stat. § 944.11(2) (1965-66). The charges were based on acts that McGuire committed between 1966 and 1968. Although prosecutions under § 944.11(2) are subject to the six-year statute of limitations under Wis. Stat. § 939.74(1) (2007-08),[FN1] the statute of limitations was tolled while McGuire was not publicly a resident of Wisconsin. Wis. Stat. § 939.74(3).[FN2] A jury convicted McGuire on all five counts.

FN1. All subsequent references to the Wisconsin Statutes are to the 2007-08 version unless otherwise indicated.

FN2. Wisconsin Stat. § 939.74(3) has been part of the Wisconsin Criminal Code since December 1955.

¶2 McGuire filed a postconviction motion that the circuit court denied. The court of appeals affirmed. In this court, McGuire raises four issues: (1) whether the tolling provision of Wis. Stat. § 939.74(3) is unconstitutional as applied to the facts of this case; (2) whether charges were barred by due process because of the roughly 36 years that passed between the offenses and the charges; (3) whether reversal in the interest of justice under Wis. Stat. § 751.06 is appropriate; and (4) whether McGuire was denied effective assistance of counsel.

¶3 We conclude that Wis. Stat. § 939.74(3) is constitutional as applied to the facts of this case. It does not violate the Privileges and Immunities, Due Process, or Equal Protection provisions of the United States Constitution. Section 939.74(3) does not burden a fundamental right, and it is rationally related to the legitimate governmental interests of detecting crimes and apprehending criminals.

¶4 We next conclude that the charges were not barred by due process. McGuire has failed to allege an improper motive or purpose on the part of the State, which is a necessary prerequisite for dismissal based on pre-indictment delay.

¶5 We also are satisfied that McGuire received a fair trial in which the real controversy was fully tried and justice has not for any reason miscarried. Therefore, reversal in the interest of justice is inappropriate.

¶6 Finally, we reject McGuire's contention that he was denied effective assistance of counsel. The two decisions of trial counsel that McGuire claims constituted deficient performance were part of a reasonable trial strategy.

¶7 For the reasons set forth, we affirm the court

of appeals.

I. BACKGROUND AND PROCEDURAL HISTORY

¶8 The facts are disputed, but the evidence at trial showed the following: McGuire was a Jesuit priest who taught at the Loyola Academy in Wilmette, Illinois, a suburb of Chicago. The priests who taught at the school lived in a residence attached to the school. Loyola Academy was not a boarding school, and students do not live on the campus. Students were permitted in the Jesuits' residence only for limited purposes, such as helping to carry a package.

¶9 Victor B. was 13 years old when he began attending Loyola in the fall of 1966. McGuire offered to counsel and tutor Victor, who was having trouble in school. McGuire then had Victor live with him in his residence at Loyola. While living in the room, Victor would sleep in the same bed as McGuire, often in the nude. The two began giving each other body massages, which included touching each others' genitals.

¶10 During this time, McGuire became acquainted with Victor's uncle, Harry B. In the spring of 1967, McGuire began visiting Harry's cottage in Fontana, Wisconsin. While McGuire and Victor were in Wisconsin-whether they were riding in the car or at

the cottage McGuire would give Victor what he referred to as "horse bites," which he would perform by grabbing Victor below his groin and brushing his hand over Victor's genitals. The "horse bites" continued through the summer of 1968.

¶11 Sometime around November of 1967, McGuire visited the Fontana cottage while Victor was there. The only other person at the cottage at that time was Victor's grandmother. While Victor was in bed, McGuire entered the room, and Victor pretended to be asleep. McGuire put his hands down Victor's pants and squeezed his testicles and penis to wake him up.

¶12 In the fall of 1968, Victor returned to Loyola Academy but stopped living in McGuire's room. The sexual contact stopped at that time.

¶13 Sean C. was 14 years old when he began attending Loyola Academy in August of 1968. Because Sean was having problems getting to school, he was sent to see McGuire for guidance counseling. McGuire suggested that Sean stay at Loyola to avoid the problem of getting to school in the morning. McGuire told Sean to tell his father that he was sleeping in McGuire's guidance office, when in fact Sean was staying in bed with McGuire. Sean testified that McGuire took steps to hide the fact that Sean was

living with McGuire.

¶14 While Sean was staying in McGuire's room, the two began to give each other massages. During these massages, McGuire would touch Sean's penis and have Sean touch his.

¶15 McGuire took Sean on several trips. Sometime between Thanksgiving and Christmas of 1968, the two travelled together to the Fontana cottage on a Friday. Sean was 14 years old at the time. On Friday night at the Fontana cabin, McGuire began massaging Sean's penis with baby oil. He then changed positions and told Sean to do the same to him. The next night, the two performed the same acts again.

¶16 Sean continued to live with McGuire during his freshman year at Loyola. He would stay in McGuire's room roughly four nights a week, and sexual contact occurred nearly every day. During the summer, McGuire and Sean traveled to Europe, and sexual contact occurred on this trip. In the fall, Sean returned to living with McGuire, and the sexual contact continued.

¶17 In February of 1970, Sean reported the sexual contact to Father Charles Schlax. Later, several Jesuits-Father Renke, the president of Loyola; Father

Beall, the principal; and Father Humbert, the headmaster-interviewed Sean. Sean's father attended this meeting. After Sean left the meeting, his father told him that he would not return to Loyola, and Sean was transferred to a different school. Neither the school nor Sean's father contacted the police.

¶18 In June of 2003, Sean contacted an attorney about the sexual contact with McGuire. On August 1, 2003, Sean filed a civil lawsuit against the Jesuits and McGuire.

¶19 In August of 2003, Victor received a letter from the headmaster of Loyola Academy about reports of sexual misconduct. After he did some research, Victor contacted Sean's attorney, who put him in touch with Sean. According to Victor and Sean, they did not know each other before they spoke on the phone in 2003. During their phone conversation, Sean obtained some information about the Fontana cottage, but both Victor and Sean later denied having discussed what McGuire had actually done to either of them or the layout of McGuire's room at Loyola.

¶20 On February 7, 2005, a criminal complaint was filed in Walworth County charging McGuire with two counts of indecent behavior with a child, in violation of Wis. Stat. § 944.11(2) (1965).[FN3] The

complaint was later amended to add three additional counts.

FN3. Wis. Stat. § 944.11 (1965-66) provided: "Any of the following may be imprisoned not more than 10 years: ... (2) whoever takes indecent liberties with the privates of any person under the age of 18."

¶21 A four-day jury trial began on February 19, 2006. Victor and Sean both testified at trial; McGuire did not. The jury found McGuire guilty on all five counts.

¶22 McGuire filed a motion for postconviction relief asking for dismissal of charges or, alternatively, a new trial. He argued, inter alia, that the statute of limitations tolling provision in Wis. Stat. § 939.74(3) was unconstitutional, reversal was warranted in the interest of justice, and the charges were barred by due process. He also raised an ineffective assistance of counsel claim based on the decision of his trial counsel, Gerald Boyle, not to investigate Harry B.'s wife, Elita, who would testify regarding Harry's unwillingness to give out keys to the Fontana cottage. Finally, he argued that a new trial was warranted because McGuire discovered after trial that Robert Goldberg, who McGuire had known previously, would have testified that he saw Sean and Victor together shortly after they graduated from high school. [FN4] After a

hearing on the ineffective assistance of counsel claim, the court denied the motion.

> FN4. In response to the State's claim that McGuire's trial counsel knew about Goldberg, McGuire also argued that if trial counsel had known about the evidence, his failure to investigate and call Goldberg constituted ineffective assistance of counsel.

¶23 McGuire appealed, raising four arguments: (1) the charging delay violated his constitutional rights; (2) he received ineffective assistance of counsel; (3) the circuit court erroneously admitted other acts evidence; and (4) the circuit court erroneously allowed rebuttal evidence. The court of appeals affirmed the circuit court on all four issues.

¶24 McGuire petitioned this court for review, which we granted on September 10, 2009.

II. STANDARD OF REVIEW

¶25 The constitutionality of a statute is a question of law, which we review de novo. *State v. Cole,* 2003 WI 112, ¶ 10, 264 Wis.2d 520, 665 N.W.2d 328. Statutes are presumed to be constitutional, and a party challenging a statute's constitutionality must demonstrate that it is unconstitutional beyond a reasonable doubt. *State v. Baron,* 2009 WI 58, ¶ 10,

318 Wis.2d 60, 769 N.W.2d 34. This presumption and burden apply to as-applied constitutional challenges to statutes as well as to facial challenges. *State v. Wood,* 2010 WI 17, ¶ 15, 323 Wis.2d 321, 780 N.W.2d 63.

¶26 Whether a defendant's right to due process was violated also presents a question of law that we review de novo. *State v. Shiffra,* 175 Wis.2d 600, 605, 499 N.W.2d 719 (1993).

¶27 We review an ineffective assistance of counsel claim as a mixed question of fact and law. *State v. Doss,* 2008 WI 93, ¶ 23, 312 Wis.2d 570, 754 N.W.2d 150. We uphold the circuit court's factual findings unless they are clearly erroneous, but review de novo whether an attorney's performance was constitutionally deficient. *Id.*

III. DISCUSSION

¶28 McGuire raises four issues, which we address in turn. First, we address whether the statute of limitations tolling provision of Wis. Stat. § 939.74(3) is unconstitutional as applied to the facts of this case. Second, we address whether due process barred the filing of charges roughly 36 years after McGuire committed the offenses. Third, we address whether reversal is appropriate in the interest of justice.

Fourth, we address whether McGuire was denied effective assistance of counsel at trial.

A. Constitutionality of Wis. Stat. § 939.74(3)

¶29 McGuire first argues that the statute of limitations tolling provision contained in Wis. Stat. § 939.74(3) is unconstitutional as applied to the facts of this case. He argues that it violates the Privileges and Immunities, Equal Protection, and Due Process provisions of the United States Constitution and their analogues in the Wisconsin Constitution.[FN5]

FN5. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2. The Fourteenth Amendment reads in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. IV; *see also* Wis. Const. art. I, §§ 1, 8.

¶30 With certain exceptions, "prosecution for a felony must be commenced within 6 years ... after the commission thereof." Wis. Stat. § 939.74(1). However,

"[i]n computing the time limited by this section, the time during which the actor was not publicly a resident within this state ... shall not be included." Wis. Stat. § 939.74(3). It is undisputed that McGuire was not publicly a resident of Wisconsin at any point since the commission of the offenses.

¶31 This court addressed the constitutionality of Wis. Stat. § 939.74(3) in *State v. Sher,* 149 Wis.2d 1, 437 N.W.2d 878 (1989). The defendant in *Sher,* a public resident of Florida, was charged with theft two years after the six-year statute of limitations had run. *Id.* at 7, 437 N.W.2d 878. He argued that § 939.74(3) was unconstitutional as applied to the facts of his case because it violated both the Privileges and Immunities Clause and the Equal Protection Clause. *Id.* at 10, 437 N.W.2d 878.

¶32 The court first addressed Sher's privileges and immunities claim. It noted that the clause does not require "absolute equality" between residents and nonresidents and permits disparate treatment because nonresidents "may present special problems for the administration of state laws." *Id.* at 11, 437 N.W.2d 878 (citing *Taylor v. Conta,* 106 Wis.2d 321, 329, 316 N.W.2d 814 (1982)). The court then applied a three-part test to determine whether a statute is constitutional under the Privileges and Immunities

Clause:

> First, this court must consider whether the statute disadvantages nonresidents as compared to residents. If there is a disadvantageous treatment of nonresidents, then this court examines the statute under the second step; whether the discrimination violates a fundamental right. Finally, if a fundamental right is infringed, this court must decide if the means employed [by the statute] bear a substantial relation to legitimate state objectives.

Id. at 11, 437 N.W.2d 878 (alteration in original) (internal citations and quotation omitted).

¶33 The court acknowledged that § 939.74(3) "disadvantages" nonresidents because only public residents of Wisconsin could claim the benefit of the statute. *Id.* at 12, 437 N.W.2d 878. It then rejected the defendant's argument that § 939.74(3) burdened a fundamental right, reasoning that statute of limitations defenses are not fundamental rights. *Id.* (citing *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 893, 108 S.Ct. 2218, 100 L.Ed.2d 896 (1988)). *See also Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314, 65 S.Ct. 1137, 89 L.Ed. 1628 (1945).

¶34 Although the court did not need to inquire further, it went on to explain that a "substantial reason for discrimination" between nonresidents and

residents existed:

> We find the provision is substantially related to several legitimate state objectives: the identification of criminals, the detection of crimes, and the apprehension of criminals. Investigation of crimes is easier for law enforcement officials when people central to the incident, and who may have vital information, are located within the state.... Even if suspects are located, local law enforcement agencies may not possess enough resources to send someone to question or investigate the suspect who resides outside of Wisconsin. In such cases, Wisconsin authorities might have to rely on the resources of other state's police and could burden those other departments. In addition, cases which would be important here, may be given less attention if other authorities were responsible for investigation. Furthermore, if a suspect is charged, apprehension of them is easier if they are public residents than if they reside out of state.

Sher, 149 Wis.2d at 14, 437 N.W.2d 878.[FN6]

> FN6. Two decades have passed since the *Sher* decision, but we see no reason to alter its fundamental conclusions. *State v. Sher,* 149 Wis.2d 1, 437 N.W.2d 878 (1989). This court has explained that statutes of limitation promote fair and prompt litigation and protect defendants from stale or fraudulent claims "brought after memories have faded or evidence has been lost." *Korkow v. General Cas. Co. of Wis.,* 117 Wis.2d 187, 198, 344 N.W.2d 108 (1984) (citation omitted). However, some offenses have never had statutes of limitation; the legislature has lengthened statutes

> of limitation in certain cases, particularly cases involving minors; and scientific evidence such as DNA has frequently neutralized the argument that claims should not proceed because evidence is unreliable. Because the tolling provision in Wis. Stat. § 939.74(3) long predated the offenses in this case, we see little or no basis for an argument that McGuire has a fundamental right to a statute of limitations defense.

¶35 The *Sher* court next addressed the constitutionality of § 939.74(3) under the Equal Protection Clause. *Id.* at 15, 437 N.W.2d 878. Because § 939.74(3) did not burden a fundamental right, the court inquired into whether the legislature made an "irrational or arbitrary classification." *Id.* (quoting *State v. Bleck,* 114 Wis.2d 454, 468, 338 N.W.2d 492 (1983)). It reasoned that, because § 939.74(3) was "substantially related" to the state's interest in detecting crimes and identifying and apprehending criminals, the statute also was rationally related to those interests, as the "rationally related" test was a lesser standard than the "substantially related" test. *Id.* at 16, 437 N.W.2d 878.

¶36 McGuire argues that *Sher* is not controlling because *Sher* was decided as a facial challenge, not an as-applied challenge. He asserts that this case is distinguishable from *Sher* for two reasons: (1) in this case, § 939.74(3) burdened his fundamental right to present a defense; and (2) on these facts, § 939.74(3)

does not accomplish the statutory objectives set out in *Sher*. As we see it, the facts of this case are similar to the facts in *Sher*, and, as with *Sher*, § 939.74(3) is constitutional as applied to these facts.[FN7]

> FN7. Although the court in *Sher* discussed the broad constitutionality of Wis. Stat. § 939.74(3), Sher specifically argued that the statute was unconstitutional as applied to him. *Sher*, 149 Wis.2d at 10, 437 N.W.2d 878 ("Sher's counsel contends he is not arguing that the tolling provision is unconstitutional on its face. Rather, he argues that the provision may be unconstitutionally applied in this case."). For a thorough discussion of the difference between "facial" challenges and "as-applied" challenges, *see State v. Wood*, 2010 WI 17, 323 Wis.2d 321, 780 N.W.2d 63.

¶37 First, the tolling of the statute of limitations did not deprive McGuire of the right to present a defense. Although McGuire casts the deprivation under the tolling provision as a deprivation of the right to present a defense, § 939.74(3) deprived him only of the right to a statute of limitations defense. *Id.* His argument, if taken to its natural conclusion, would suggest that the constitution *requires* statutes of limitation in certain cases, lest defendants be deprived of their right to present a defense. Yet, statutes of limitation are not constitutionally required. Wisconsin has no statutes of limitation for certain crimes,[FN8] while some states have no statutes of limitations for

any criminal offense.[FN9] The extent to which the passage of time burdens a fundamental right is a separate constitutional question independent of the constitutionality of § 939.74(3).

FN8. These include several forms of homicide and sexual assault of a child. Wis. Stat. § 939.74(2)(a).

FN9. *See, e.g. Bush v. State,* 193 P.3d 203, 221 (Wyo.2008).

¶38 Second, McGuire distinguishes *Sher* on the grounds that none of the statutory objectives described in *Sher* applies to him. He argues that the interests of identifying criminals, detecting crimes, and apprehending criminals are not furthered by applying § 939.74(3) to these facts, because McGuire did not flee justice and was easy to locate.

¶39 In truth, however, the facts in this case are closely related to identifying criminals, detecting crimes, and investigating those crimes. When McGuire either transported a minor from Illinois to Wisconsin or met an Illinois minor in Wisconsin, he was able to engage in unlawful sexual activity with minors away from co-workers at Loyola Academy who were more likely to notice impropriety. Correspondingly, because neither McGuire nor the victims were residents of Wisconsin, McGuire's sporadic visits to the state made the detection of his crimes by Wisconsin authorities

and the reporting of his crimes by the minor victims to Wisconsin authorities, much less likely.

¶40 The relevant facts here are analogous to the facts in *Sher*. In *Sher*, the circuit court found as fact that the defendant "never left Wisconsin in an attempt to conceal or prevent knowledge of his whereabouts" and that "information was available to both private parties and law enforcement officials as to his residency status and whereabouts." *Id.* at 7, 437 N.W.2d 878. On those facts, this court still concluded that § 939.74(3) bore substantial relation to the objectives described in that case.

¶41 The fact that a defendant was not in hiding and did not flee justice does not render § 939.74(3) unconstitutional as applied to him. Law enforcement agencies still may lack the resources to investigate a suspect outside the state; they may have to rely on the resources of police departments in other states, burdening those departments; and reliance on police departments in other states may result in lesser importance being given to investigating if other authorities are responsible for the investigation. *See Sher*, 149 Wis.2d at 14, 437 N.W.2d 878. These state interests would satisfy the constitutional requirements of the Privileges and Immunities Clause regardless of the fact that they may not be compelling in a given

case.

¶42 McGuire also argues that Wis. Stat. § 939.74(3) is unconstitutional because it violates the Due Process and Equal Protection Clauses. Because § 939.74(3) neither interferes with a fundamental right nor disadvantages a suspect class, we apply rational basis review to both the equal protection and due process claims. *See State v. Jorgensen,* 2003 WI 105, ¶¶ 32-33, 264 Wis.2d 157, 667 N.W.2d 318 (describing the similarities between due process and equal protection analysis); *see also State v. Annala,* 168 Wis.2d 453, 468, 484 N.W.2d 138 (1992).

¶43 McGuire again distinguishes *Sher* on the grounds that he is bringing an as-applied challenge, not a facial challenge. His argument, however, ignores the fact that the "basic formulation" of the rational basis test is the same in both facial and as-applied challenges. *Smith v. City of Chicago,* 457 F.3d 643, 652 (7th Cir.2006). Under this standard, the constitution requires only that the statute creating a classification be "rationally related to a valid legislative objective." *Jorgensen,* 264 Wis.2d 157, ¶ 33, 667 N.W.2d 318 (quoting *State v. McManus,* 152 Wis.2d 113, 130-31, 447 N.W.2d 654 (1989)). The distinction between public residents and public non-residents set out in Wis. Stat. § 939.74(3) is rationally related to the

legitimate government interests of identifying criminals, detecting crimes, and apprehending criminals. Therefore, § 939.74(3) is constitutional under both the Equal Protection and Due Process Clauses.

B. Due Process Claim Based on Passage of Time

¶44 McGuire next argues that the charges against him were barred by due process. He argues that the 36-year passage of time between the commission of the offenses and the charges prejudiced his defense because critical witnesses died and evidence was destroyed.

¶45 "The statute of limitations is the principal device ... to protect against prejudice arising from a lapse of time between the date of an alleged offense and an arrest." *State v. Wilson,* 149 Wis.2d 878, 903, 440 N.W.2d 534 (1989) (citing *United States v. Lovasco,* 431 U.S. 783, 788-89, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977)). Nonetheless, the statute of limitations is not the sole measure of a defendant's rights with respect to pre-indictment delay, and "the Due Process Clause has a limited role to play in protecting against oppressive delay." *Lovasco,* 431 U.S. at 789, 97 S.Ct. 2044. Wisconsin has adopted a two-part test to determine whether pre-indictment

delay constitutes a due process violation:

> Where a defendant seeks to avoid prosecution based upon prosecutorial delay, it is clear that it must be shown that the defendant has suffered actual prejudice arising from the delay and that the delay arose from an improper motive or purpose such as to gain a tactical advantage over the accused.

Wilson, 149 Wis.2d at 904-05, 440 N.W.2d 534 (quoting *State v. Rivest*, 106 Wis.2d 406, 418, 316 N.W.2d 395 (1982)). This court recently reaffirmed *Wilson*, holding that a defendant claiming a due process violation based on pre-indictment delay must show: "(1) actual prejudice as a result of delay; and (2) the delay arose out of an improper purpose, [such as to] give the State a tactical advantage over the defendant." *State v. MacArthur*, 2008 WI 72, ¶ 45, 310 Wis.2d 550, 750 N.W.2d 910 (citing *State v. Dabney*, 2003 WI App 108, ¶ 30, 264 Wis.2d 843, 663 N.W.2d 366).

¶46 McGuire acknowledges his inability to "establish that the delay resulted from some improper *prosecutorial* motive" or purpose. Instead he argues that *Wilson* "misconstrued the authorities upon which it relied." McGuire cites three United States Supreme Court cases that he claims *Wilson* misconstrued. A close examination of those cases reveals that *Wilson* properly interpreted and applied those cases.

¶47 McGuire first argues that *Wilson* misconstrued *United States v. Marion,* 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). In *Marion,* the Court explicitly declined to address "when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution." *Id.* at 324, 92 S.Ct. 455. Therefore, *Marion* neither supports nor contradicts the holding in *Wilson*-it simply did not address the issue decided in *Wilson.*

¶48 McGuire next argues that *Wilson* misconstrued *Lovasco.* In *Lovasco,* the defendant based his due process claim on a 17-month delay during an investigation. *Lovasco,* 431 U.S. at 787, 97 S.Ct. 2044. The Court explained that "investigative delay is fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused.' " *Id.* at 795, 97 S.Ct. 2044 (quoting *Marion,* 404 U.S. at 324, 92 S.Ct. 455). It then held that "to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." *Id.* at 796, 97 S.Ct. 2044. The Court left "to the lower courts ... the task of applying the settled principles of due process that we have discussed to the particular circumstances of individual cases." *Id.* at 797, 97 S.Ct. 2044.

¶49 Thus, although *Lovasco* explicitly left the application of its rule under specific facts to future courts, it refused to find a due process violation based upon the facts of the case in which the state did not seek a tactical advantage. The Court's language supports a distinction between prosecutions that are delayed because of an improper state motive and those that are delayed for other reasons.

¶50 Finally, McGuire argues that *Wilson* misconstrued *United States v. Gouveia,* 467 U.S. 180, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984). In *Gouveia,* the Court addressed the right to counsel for prisoners in administrative segregation awaiting indictment on federal charges. *Id.* at 182, 104 S.Ct. 2292. Addressing the concern that prosecutors might delay charges because the defendants were already in prison, the Court noted that a defendant still has a due process claim "if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense." *Id.* at 192, 104 S.Ct. 2292 (citing *Lovasco,* 431 U.S. at 789-90, 97 S.Ct. 2044).

¶51 Like *Lovasco, Gouveia* clearly described the basic requirements of the Due Process Clause. The *Wilson* court did not "misconstrue" *Lovasco* and

Gouveia, but applied the due process requirements set out in those cases. Indeed, *Wilson* is consistent with *Lovasco*'s refusal to "adopt a rule which would [require prosecutors to charge as soon as they had evidence of guilt] absent a clear constitutional command to do so." *Lovasco,* 431 U.S. at 795, 97 S.Ct. 2044.

¶52 Federal circuit court precedent confirms that *Wilson* correctly interpreted and applied *Lovasco* and its progeny. Nearly every federal circuit has adopted some variant of the test adopted in *Wilson.*[FN10] The Seventh Circuit has adopted two different tests. *See Wilson v. McCaughtry,* 994 F.2d 1228, 1233 (7th Cir.1993). Many Seventh Circuit cases have applied tests similar to that in *State v. Wilson,* by requiring the defendant to show that the prosecution delayed for either a "tactical advantage" [FN11] or "impermissible purpose." [FN12] In other cases, the Seventh Circuit has applied a test that balances prejudice to the defendant against the government's reason for the delay, but even this test still looks at the *government's* purpose for the delay.[FN13] Acknowledging the split but declining to resolve it, the Seventh Circuit has noted that "were we required to choose between the two tests ..., *Gouveia* would be powerful support for adopting a requirement that defendants show actual prejudice caused by a purposeful, tactical delay by the prosecution." *McCaughtry,* 994 F.2d at 1233 n. 5.

FN10. *United States v. Crouch,* 84 F.3d 1497, 1523 (5th Cir.1996); *United States v. Hayes,* 40 F.3d 362, 367 (11th Cir.1994); *United States v. Engstrom,* 965 F.2d 836, 839 (10th Cir.1992); *United States v. Brown,* 959 F.2d 63, 66 (6th Cir.1992); *United States v. Hoo,* 825 F.2d 667, 671 (2d Cir.1987) ("no showing of an improper prosecutorial motive"); *United States v. Sebetich,* 776 F.2d 412, 430 (3d Cir.1985); *United States v. Crooks,* 766 F.2d 7, 11 (1st Cir.1985); *United States v. Bartlett,* 794 F.2d 1285, 1293 (8th Cir.1986) (in dicta). Only the Fourth Circuit and the Ninth Circuit have adopted different tests. *See United States v. De Jesus Corona-Verbera,* 509 F.3d 1105, 1112 (9th Cir.2007) (weighing length of delay against reasons for delay); *Howell v. Barker,* 904 F.2d 889, 895 (4th Cir.1990) (balancing prejudice against "government's justification for delay").

FN11. *See, e.g., United States v. Wallace,* 326 F.3d 881, 886 (7th Cir.2003) (quoting *United States v. Dickerson,* 975 F.2d 1245, 1252 (7th Cir.1992)).

FN12. *See, e.g., United States v. Wellman,* 830 F.2d 1453, 1460 (7th Cir.1987).

FN13. *See United States v. Doerr,* 886 F.2d 944, 964 (7th Cir.1989) (weighing "actual prejudice ... against the government's reasons for the delay"); *see also United States v. Perry,* 815 F.2d 1100, 1103 (7th Cir.1987).

¶53 Because McGuire has failed to identify any improper motive or purpose on the part of the State, we need not address whether McGuire was prejudiced

by the delay. In any event, McGuire has failed to meet the requisite showing of prejudice. "The death of a witness alone is not sufficient to establish prejudice." *United States v. Eckhardt,* 843 F.2d 989, 995 (7th Cir.1988). The defendant must explain the substance and relevance of the witness's testimony; the showing must be concrete, not speculative. *Id.* (citing *United States v. Antonino,* 830 F.2d 798, 804-05 (7th Cir.1987)).

¶54 McGuire identifies a number of deceased witnesses that he claims would have corroborated his defense and rebutted Sean's and Victor's testimony. These witnesses include other priests living in the Loyola Academy residences; McGuire's secretary, John Gooch; Victor's uncle and owner of the Fontana cottage, Harry B.; and various relatives of Victor and Sean. McGuire asserts that the priests would testify that Sean and Victor could not have lived with McGuire undetected, Gooch would testify that McGuire was not involved with Victor and Sean, and Harry would testify that he did not give McGuire a key to the cottage. However, McGuire offers no support for these assertions. Simply identifying deceased witnesses and describing testimony that they *might* have provided does not satisfy the requisite showing of actual prejudice.

¶55 McGuire also argues that Loyola Academy records, including use of fleet vehicles and the reasons for Jesuits' absences from school, would constitute exculpatory evidence. Again, McGuire merely speculates that these documents would rebut Sean and Victor's testimony, but he fails to demonstrate that those documents would actually provide the evidence he claims.

¶56 In sum, the charges against McGuire were not barred by due process because he has failed to allege an improper prosecutorial motive. Furthermore, while he has identified potential witnesses and evidence that might have been relevant to issues at trial, his assertions about what that testimony would prove are speculative. Consequently, he has failed to demonstrate the actual prejudice required to prove a due process violation.

C. Reversal in the Interest of Justice

¶57 McGuire next argues that reversal is warranted in the interest of justice under Wis. Stat. § 751.06. He claims that the delay in bringing charges "so undermined" his ability to defend himself that the real controversy was not fully tried.

¶58 Wisconsin Stat. § 751.06 describes this court's

power of discretionary reversal:

> [I]f it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from ... and may direct the entry of the proper judgment or remit the case to the trial court for the entry of the proper judgment or for a new trial....

Id.

¶59 We will exercise our discretionary power of reversal "only in exceptional cases." *State v. Hicks,* 202 Wis.2d 150, 161, 549 N.W.2d 435 (1996). In doing so, we look at the "totality of circumstances and determine whether a new trial is required to accomplish the ends of justice." *Id.* (quoting *State v. Wyss,* 124 Wis.2d 681, 735-36, 370 N.W.2d 745 (1985)).

¶60 McGuire argues that, because of the delay, a new trial is an insufficient remedy, and asks for outright dismissal of the charges. We conclude that discretionary reversal is inappropriate on these facts.

¶61 In support of his argument that the real controversy was not fully tried, McGuire points to the same deceased witnesses and missing evidence that he cites to support his claim that the charges were barred

by due process. As we articulated earlier, his assertions regarding unavailable evidence were too speculative to constitute actual prejudice; for the same reason, we conclude that the real controversy was fully tried and justice has not miscarried.

¶62 McGuire cites *State v. Cuyler,* asserting that it is analogous to the facts of this case because credibility was a central issue in both cases. *State v. Cuyler,* 110 Wis.2d 133, 141-42, 327 N.W.2d 662 (1983). In *Cuyler,* this court reversed for a new trial because the circuit court excluded evidence that was admissible and material to the "critical issue of credibility," which was "a determinative issue" in the case. *Id.* at 141, 327 N.W.2d 662. *Cuyler* does not, however, support the use of our discretionary reversal power in this case. The evidence at issue in *Cuyler* was the testimony of police officers who would have testified as to the defendant's truthfulness. *Id.* We have no analogous situation in this case. Unlike the court in *Cuyler,* we simply have no idea what most of the unavailable witnesses would have said or how their testimony might have affected the relevant issues.

¶63 Additionally, while the unavailable evidence might have been relevant to the major issues at trial-Victor and Sean's claims about going to Fontana, the events of Sean's meeting with Father Schlax, and

the credibility of Sean and Victor's claims that they lived in McGuire's room-those issues were fully tried by available evidence. Father Schlax was available to testify, and the defense put Father Renke's notes of the meeting with Sean into evidence, which were used to impeach Sean's testimony regarding the events of the meeting. Similarly, the defense presented evidence and cross-examined prosecution witnesses to rebut Sean and Victor's testimony that they had lived in McGuire's room.[FN14] Most important, Sean and Victor themselves were both available for trial, and were rigorously cross-examined by McGuire's trial counsel.

FN14. For example, Father James Gschwend testified that the Jesuits were expected to be at evening meals and someone would have asked a Jesuit why he was missing meals, contradicting Victor's testimony that he ate with McGuire after the other Jesuits were finished eating. McGuire's physician, Dr. Robert Ryan, testified regarding the layout of McGuire's room. Father James Arimond, who lived in the residences at Loyola from 1964 to 1967, testified that he never saw any young children in the residence in 1966 or 1967.

¶64 Based on the evidence presented at McGuire's trial, and without any indication of what the unavailable evidence would have demonstrated, we conclude that reversal is unwarranted because the real controversy was fully tried and justice was not miscarried.

D. Ineffective Assistance of Counsel

¶65 Finally, McGuire argues that he was deprived of effective assistance of counsel. To prove an ineffective assistance of counsel claim, a defendant must first demonstrate that counsel's performance was deficient, meaning that it "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts are "highly deferential" in scrutinizing counsel's performance, and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689, 104 S.Ct. 2052. The defendant must also show that the deficient performance prejudiced the defense. *Id.* at 692, 104 S.Ct. 2052. This requires a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052.

¶66 McGuire first argues that Attorney Boyle unreasonably decided not to investigate and call Harry B.'s wife Elita, who would have testified that Harry was possessive about his keys and would not give them to just anybody. Boyle explained that because he intended to argue that Sean was never in Fontana, whether McGuire had a key was not an issue in the case and he did not want to make it an issue.

Furthermore, he believed that Elita's testimony would have been directly refuted by Harry's sister Gertrude, who would have testified that McGuire had a key and could come and go at will. Finally, he believed that Elita's testimony would have been both speculation and inadmissible hearsay.

¶67 Boyle's decision not to investigate and call Elita was part of a reasonable trial strategy. It is unclear what her trial testimony would have added. She testified that she had "no idea" what Harry did with his keys prior to 1971, the year they were married. The offenses in this case predated the marriage. Thus, the speculative nature of her testimony confirms Boyle's reasoning that "[t]here was nothing to be gained" by presenting it.

¶68 McGuire also argues that Boyle's performance was deficient because he failed to investigate and call Robert Goldberg. Goldberg would have testified that he saw Victor and Sean together at dinner several times in 1972, at a residence shared by Gooch and Eugene P. At the time, Goldberg was 14 years old.

¶69 Boyle's decision not to call Goldberg constituted a reasonable trial strategy. First, Goldberg's testimony would have corroborated Sean's statement to police that he saw McGuire together with

Goldberg on the Loyola Academy campus. Goldberg's testimony also would have raised questions about why McGuire was spending time with a 14-year-old boy who was not a student at Loyola. Furthermore, his testimony would have placed Sean and Victor together with Eugene P.-who also alleged that McGuire sexually abused him-near the time of the offenses. Finally, Goldberg would have been impeachable by prior criminal convictions. Boyle came to the reasonable conclusion that, because Goldberg's testimony corroborated Sean's testimony, it was "the most dangerous thing [he] had heard from the beginning of the case until the end of the case."

¶70 McGuire argues that, even if Boyle did not call Goldberg, he could not have reasonably made that decision without investigating Goldberg. Counsel need not investigate every potential witness, but he "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *State v. Thiel,* 2003 WI 111, ¶ 40, 264 Wis.2d 571, 665 N.W.2d 305 (quoting *Strickland,* 466 U.S. at 691, 104 S.Ct. 2052). The inherent danger in Goldberg's testimony outweighed any potential benefit it might have had to the defense. Boyle made a reasonable decision that rendered further investigation of Goldberg unnecessary.

¶71 Because we conclude that Boyle's representation was not deficient, we need not address whether McGuire was prejudiced by counsel's representation.

IV. CONCLUSION

¶72 In sum, Wis. Stat. § 939.74(3) is constitutional as applied to the facts of this case. It does not violate the Privileges and Immunities, Due Process, or Equal Protection provisions of the United States Constitution. Section 939.74(3) does not burden a fundamental right, and it is rationally related to the legitimate governmental interests of detecting crimes and apprehending criminals.

¶73 We also conclude that the delay in filing charges did not deprive McGuire of his due process rights. Because McGuire concedes that he cannot demonstrate an improper motive or purpose on the part of the state, he has failed to allege a necessary prerequisite for dismissal based on pre-indictment delay.

¶74 We are also satisfied that the real controversy was tried and justice has not miscarried for any reason. Therefore, reversal in the interest of justice is unwarranted.

¶75 Finally, we conclude that McGuire was not denied effective assistance of counsel. Trial counsel pursued a reasonable trial strategy in deciding not to investigate or call either Elita or Goldberg.

¶76 For the foregoing reasons, we affirm the court of appeals.

The decision of the court of appeals is affirmed.

APPENDIX B

STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2007AP2711-CR
(L.C. No. 2005CF80)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONALD J. MCGUIRE,

Defendant-Appellant-Petitioner.

March 1, 2010

PER CURIAM. The members of the court disagree as to the disposition of the motions of defendant-appellant-petitioner, Donald J. McGuire, for the recusal of Justice Michael J. Gableman. Justice Gableman is not participating in this order.

Three justices, Chief Justice Shirley S. Abrahamson, Justice Ann Walsh Bradley, and Justice N. Patrick Crooks, would order briefs and oral argument, as the parties have requested.

Three justices, Justice David T. Prosser, Justice Patience Drake Roggensack, and Justice Annette Kingsland Ziegler, would issue an order denying the motions.

The parties are referred to the court's order of February 11, 2010, in State v. Allen. No. 2007AP795, 2010 WI 10, ___ Wis.2d ___, ___ N.W.2d ___, 2010 WL 457545, for the justices' writings in explanation.

Because the members of the court disagree as to the disposition of defendant-appellant-petitioner's motions as set forth above, the motions are not granted. No four justices have agreed to grant the motions.

David R. Schanker
Clerk of Supreme Court

APPENDIX C

STATE OF WISCONSIN
COURT OF APPEALS

Case No. 2007AP2711-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONALD J. MCGUIRE,

Defendant-Appellant

May 20, 2009

Appeal from a judgment and an order of the circuit court for Walworth County: James L. Carlson, Judge. *Affirmed.*

Before BROWN, C.J., SNYDER and NEUBAUER, JJ.

¶1 PER CURIAM. Donald J. McGuire appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. He was convicted of five counts of having taken "indecent liberties" with two children in 1967 and

1968. McGuire was a priest and a teacher at the school the two children attended. McGuire argues that: (1) the thirty-six year delay in bringing these charges prejudiced his defense and violated his constitutional rights; (2) he received ineffective assistance of trial counsel; (3) the trial court erroneously admitted unduly prejudicial other acts evidence at trial; and (4) the trial court erroneously allowed unfairly prejudicial rebuttal evidence. McGuire argues as a result of these errors, the charges against him should be dismissed or he is entitled to a new trial in the interests of justice. We conclude that the delay was not unfairly prejudicial, he did not receive ineffective assistance of trial counsel, and the trial court did not erroneously exercise its discretion in its evidentiary rulings. We also conclude that McGuire is not entitled to a new trial in the interests of justice. Consequently, we affirm the judgment and order of the circuit court.

¶2 McGuire was a Jesuit priest who at the relevant times taught at Loyola Academy in Illinois. The school was not a boarding school. Victor B. and Sean C. were students at the school in the mid to late 1960's. Both Victor and Sean alleged that when they were fourteen or fifteen years old and while they were students at the school, they travelled separately and on different occasions, with McGuire to Fontana, Wisconsin, to stay at a cottage and had sexual contact

with McGuire while there.[FN1] The cottage belonged to Victor's uncle.

FN1. Victor testified that the incidents occurred at his uncle's cottage during the fall of 1967 and spring of 1968. Sean testified that the incidents involving him occurred at the cottage between Thanksgiving and Christmas of 1968.

¶3 Sean and Victor reported the abuse to the police many years later in 2003, and a criminal complaint was issued in 2005. A trial was held in February 2006, and the jury convicted McGuire on all five counts. The court sentenced him to concurrent terms of seven years in prison on two counts, and twenty years of probation, to be served concurrently, on the remaining three counts. The court stayed the prison term pending the postconviction proceedings.

¶4 McGuire filed a motion for postconviction relief alleging that the delay in filing charges against him violated the statute of limitations and his constitutional rights. He also argued that he had newly discovered evidence, had received ineffective assistance of trial counsel, and he challenged the court's decision to admit certain other acts and rebuttal evidence. The court held a hearing and heard testimony from trial counsel, potential witnesses, and others. The court denied the motion, and McGuire appeals.

¶5 McGuire first argues that the more than thirty-six year delay in bringing the criminal charges against him prejudiced his defense, and he is entitled to have the charges dismissed. He argues that many witnesses who would have aided in his defense are dead, and the memories of those who did testify have faded. He argues that the out-of-state tolling provision in the applicable statute of limitations, WIS. STAT. § 939.74(1) (1966-69), is unconstitutional as applied to him, and that because the delay resulted in actual prejudice to him, the charges against him should be barred by due process. In the alternative, he argues that the delay justifies reversal in the interests of justice.

¶6 The applicable statute of limitations contains a provision that tolls "the time during which the actor was not publicly a resident within the state." WIS. STAT. § 939.74(3) (1965-72). The Wisconsin Supreme Court ruled that this statute of limitations covers offenses, such as these, that occurred during this time period. *See State v. MacArthur,* 2008 WI 72, ¶ 17, 310 Wis.2d 550, 750 N.W.2d 910. The Wisconsin Supreme Court has also concluded that the tolling provision of the statute is constitutional, and it does not violate due process, equal protection, or the privileges and immunities clause. *State v. Sher,* 149 Wis.2d 1, 15, 437 N.W.2d 878 (1989).

¶7 McGuire argues that *Sher* does not control the outcome in this case because the court there concluded that the statute was facially valid, while he is arguing that the statute's tolling provision violates the privileges and immunities clause as well as his rights to due process and equal protection as applied to him. McGuire argues that *Sher* is distinguishable because Sher was denied his statute of limitations defense as a result of a two-year tolling of the statute of limitations. McGuire argues that, in contrast, the more than thirty-year tolling as applied in his case has denied him much of his right to present a defense. Further, he argues that, unlike *Sher*, the application of the tolling provision to his case does not meet a legitimate state interest. We disagree.

¶8 The question of whether the statute violates the privileges and immunities clause was decided by the supreme court in *Sher*. The court applied a three-part test to reach this determination: whether the statute disadvantages non-residents, whether the discrimination violates a fundamental right, and if so, whether the means employed are substantially related to a legitimate state interest. *Id.* at 11-12, 437 N.W.2d 878. The court concluded that while the statute "disadvantages" a non-resident, it also concluded that there is no fundamental right to a statute of limitations defense. *Id.* at 12, 437 N.W.2d 878. Even

though it concluded there was no fundamental right involved, the court also concluded that the statute was "substantially related to several legitimate state objectives: the identification of criminals, the detection of crime, and the apprehension of criminals." *Id.* at 14, 437 N.W.2d 878. The court stated that "sec. 939.74(3) does not violate the privileges and immunities clause." *Sher*, 149 Wis.2d at 15, 437 N.W.2d 878. We see no reason why the ruling does not apply to McGuire's case as well.

¶9 The supreme court in *Sher* also concluded that there was a rational basis for the statute. *Id.* at 15-16, 437 N.W.2d 878. The court stated that since the statute was substantially related to several legitimate state interests, "it is also rationally related to those interests since the 'rationally related' test is a lesser standard than the 'substantially related' test." *Id.* at 16, 437 N.W.2d 878. The court concluded that the application of the statute to the facts of that case did not create an "absurd result." *Id.* at 17, 437 N.W.2d 878. We similarly conclude that the application of the statute to the facts of this case is rationally related to the state's interest in identifying, detecting, and apprehending criminals.

¶10 McGuire also argues that the statute violates his due process rights. McGuire acknowledges that the

test for determining whether a delay in bringing a charge violates due process, even though the charges were brought within the statute of limitations, is whether the defendant has established actual prejudice resulting from such a delay, and whether the delay was for the purpose of giving the prosecutor a tactical advantage. *State v. Wilson*, 149 Wis.2d 878, 903-05, 440 N.W.2d 534 (1989). McGuire argues, however, that the supreme court erred in the *Wilson* decision when it ruled that the defendant had to prove that the purpose of the delay was to gain a tactical advantage.

¶11 We will not address whether the supreme court's decision in *Wilson* was incorrect. *See State ex rel. Swan v. Elections Board*, 133 Wis.2d 87, 93-94, 394 N.W.2d 732 (1986) (the court of appeals is primarily an error correcting court), and *State v. Olsen*, 99 Wis.2d 572, 583, 299 N.W.2d 632 (Ct.App.1980) (the court of appeals is bound by the prior decisions of the supreme court). We conclude that McGuire cannot establish that the delay in charging was to gain a tactical advantage because there is no dispute that the State did not learn about the crimes until 2003. We reject McGuire's argument that the statute violates due process. We conclude that the application of the statute to McGuire in this case is constitutionally permissible as decided by the supreme court in *Sher*.

¶12 McGuire also argues that the lengthy delay in bringing these charges against him was so prejudicial that his conviction should be reversed in the interest of justice under WIS. STAT. § 752.35 (2007-08), because the delay resulted in the real controversy not being tried. *See Vollmer v. Luety*, 156 Wis.2d 1, 19, 456 N.W.2d 797 (1990). McGuire argues that some of the witnesses he would like to have called at trial are dead, and that the memories of those who did testify have faded over time.

¶13 We are not convinced that McGuire was denied the fundamental right to present a defense. The three main witnesses to the events Sean, Victor, and McGuire, were all available to testify.[FN2] McGuire cross-examined the two victim-witnesses, was able to present other witnesses to support his defense, and was able to put forth his side of the story. Further, the passage of time also affected the State's ability to present its case. We decline to reverse the conviction on this basis.

FN2. McGuire did not testify at his trial.

¶14 McGuire next argues that he received ineffective assistance of trial counsel. He argues that his trial counsel, Attorney Gerald Boyle, did not investigate two potential witnesses: Elita Bender and Robert Goldberg, and that Boyle's failure to investigate

these witnesses prejudiced his defense. To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. *Id.* at 697. To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

¶15 We review the denial of an ineffective assistance claim as a mixed question of fact and law. *State v. Johnson,* 153 Wis.2d 121, 127, 449 N.W.2d 845 (1990). We will not reverse the circuit court's factual findings unless they are clearly erroneous. *Id.* However, we review the two-pronged determination of trial counsel's performance independently as a question of law. *Id.* at 128, 449 N.W.2d 845. We will not "second-guess a trial attorney's 'considered selection of trial tactics or the exercise of professional judgment in the face of alternatives that have been weighed by trial counsel.' A strategic decision rationally based on the facts and the law will not

support a claim of ineffective assistance of counsel." *State v. Elm,* 201 Wis.2d 452, 464-65, 549 N.W.2d 471 (Ct.App.1996) (citations omitted).

¶16 McGuire first argues that his trial counsel was ineffective when he did not investigate Elita Bender as a possible witness. Bender's husband owned the cottage in Fontana where the offenses took place. McGuire argues that Boyle should have called Bender as a witness to counter the State's evidence that her husband had given McGuire a key to the cottage. They were not married, however, at the time of the incidents. McGuire asserts that Bender would have testified that she only saw McGuire twice during the relevant time periods and only once at the Fontana cottage, that her husband only had two sets of keys to the cottage and was very possessive of the cottage, and that her husband did not ever suggest that McGuire was an important person to him. McGuire argues that his trial counsel's failure to investigate what Bender knew about the situation was wholly unreasonable.

¶17 At the postconviction hearing, Boyle testified that he did not believe the key was a real issue in the case. He stated that he chose to focus instead on Sean's prior statement that the assault against him took place in Eagle River and not in Fontana. Boyle stated that he did not want to "run the risk" of having Bender

testify because she had married Victor's uncle three or four years after the events of the trial, and there was another witness who would have testified that McGuire had been given a key to the cottage. Bender also testified at the postconviction hearing.

¶18 The circuit court found that Boyle did not overlook Bender as a witness, but rather made a reasoned decision not to explore her testimony both because her testimony could have been impeached and it would not have helped the defense. We conclude that the decision not to call Bender was reasonable trial strategy. Because we believe that this was a reasonable trial strategy, and nothing in Bender's postconviction testimony convinces us otherwise, we also conclude that McGuire has not established that he was prejudiced by Boyle's failure to investigate Bender as a potential witness.

¶19 McGuire also argues that his trial counsel was ineffective for failing to investigate and call at trial, Robert Goldberg, or Goldberg's sister.[FN3] McGuire argues that Goldberg's testimony would have contradicted the two victims' testimony that they did not know each other before 2003. Goldberg and his sister both testified at the postconviction hearing. Goldberg testified that in 1972, he had seen Sean and Victor at the home of another man, who also claimed to

have been sexually assaulted by McGuire. His sister also testified that she had seen the two together. McGuire asserts that this testimony would have shown that Victor and Sean knew each other in the early 1970s.

FN3. McGuire initially argued that Goldberg's testimony was newly discovered evidence. Boyle's testimony at the postconviction hearing, however, established that Boyle knew about Goldberg prior to trial. This testimony established that Goldberg's testimony was not newly discovered evidence. Consequently, McGuire argued instead that Boyle was ineffective for failing to investigate and call Goldberg at trial.

¶20 Boyle testified that he did not investigate Goldberg because he believed it would be dangerous given the potential his testimony had to corroborate Sean's story. Boyle also stated that it had the possibility of leading to the admission of other act's evidence. He stated that he believed it would have seriously harmed McGuire's defense at trial. We again conclude that the Boyle's decision not to investigate or call Robert Goldberg or his sister was a reasonable trial strategy. Further, Boyle's failure to investigate these witnesses does not undermine our confidence in the outcome of the trial. We reject McGuire's claim that he received ineffective assistance of trial counsel.

¶21 McGuire next argues that the circuit court

erred when it allowed unfairly prejudicial other acts evidence and rebuttal evidence. Prior to trial, the circuit court excluded the State's evidence that McGuire sexually assaulted two other boys. The court, however, allowed the State to introduce evidence that McGuire had sexually assaulted Victor and Sean in Illinois, both before and after the incidents in Fontana. The court allowed the evidence to show McGuire's motive and intent, the absence of mistake, and to put the nature of McGuire's relationship with the two boys in context.

¶22 "A trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has 'a reasonable basis' and was made 'in accordance with accepted legal standards and in accordance with the facts of record.' " *State v. Jenkins,* 168 Wis.2d 175, 186, 483 N.W.2d 262 (Ct.App.1992) (citations omitted). Nearly all evidence is, to some extent, prejudicial to the party against whom it is offered. *State v. Alexander,* 214 Wis.2d 628, 642, 571 N.W.2d 662 (1997). Unfair prejudice results when "the proffered evidence, if introduced, would have a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in

the case." *State v. Mordica,* 168 Wis.2d 593, 605, 484 N.W.2d 352 (Ct.App.1992) (citations omitted).

¶23 The admission of other acts evidence requires a three-step analysis. *State v. Sullivan,* 216 Wis.2d 768, 771-72, 576 N.W.2d 30 (1998). The court must consider:

> (1) Is the other acts evidence offered for an acceptable purpose under WIS. STAT. § (Rule) 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?
>
> (2) Is the other acts relevant, considering the two facets of relevance set forth in WIS. STAT. § (Rule) 904.01? The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.
>
> (3) Is the probative value of the other acts

> evidence substantially outweighed by the danger of unfair prejudice, confusion of issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence? *See* WIS. STAT. § (Rule) 904.03.

Id. at 772-73, 576 N.W.2d 30 (footnote omitted).

¶24 The circuit court in this case conducted the *Sullivan* three-step analysis, and concluded that the evidence was offered for a proper purpose, was relevant, and that the probative value was not outweighed by the danger of unfair prejudice. McGuire challenges only the circuit court's determination of the third step of the analysis, arguing that the probative value was minimal and the prejudicial effect high. He argues again that the delay in prosecution increases the prejudicial effect of this evidence. We disagree. We conclude that the evidence established motive, that the touching was not a mistake, and showed the existence of a relationship between McGuire and each of the two boys prior to their visits to the cottage. We further conclude that its prejudicial effect did not outweigh its probative value, and that the circuit court did not erroneously exercise its discretion when it admitted this evidence.

¶25 McGuire also argues that the circuit court erroneously exercised its discretion when it allowed in certain rebuttal evidence because it was cumulative. The determination of whether rebuttal evidence should be admitted is within the trial court's discretion. *Rausch v. Buisse*, 33 Wis.2d 154, 167, 146 N.W.2d 801 (1966). The victims testified at trial that McGuire's bed was next to a wall. The defense then offered evidence the testimony of Dr. Robert Ryan, McGuire's doctor who had visited his room multiple occasions. Dr. Ryan testified that McGuire's bed was not up against the wall, and that the furniture was always in the same place. In rebuttal, the State offered the testimony of two other men who had attended Loyola Academy at about the same time as the victims. These were the same men who had claimed to have been abused by McGuire, and the court had excluded their testimony about the alleged assaults in its pre-trial ruling on other acts evidence. Defense counsel objected to the rebuttal testimony, asserting that it was just an attempt to get in the evidence the court had already excluded. The court limited the two witnesses' testimony to the issue of the location of the bed. McGuire argues that this rebuttal testimony was improper because it was cumulative and unnecessarily prejudicial.[FN4]

FN4. Although we address the issue, we note that while trial counsel objected to these witnesses

testifying, he also stated that the testimony about the bed "was the only proper rebuttal."

¶26 McGuire also challenges the rebuttal evidence of Dr. Douglas Dewire. Both victims had testified that McGuire was circumcised. The defense then had Dr. Ryan testify that McGuire was not circumcised, and offered a photograph as further proof. Dr. Ryan further opined that an uncircumcised penis is "unsightly" and that "[y]ou would know whether a person was circumcised or not." In rebuttal, the State had Dr. Dewire, a urologist, testify to rebut the statement that it was easy to tell whether a person had been circumcised.

¶27 Dr. Dewire testified that an uncircumcised penis with a retracted foreskin has the same appearance as a circumcised penis. He further testified that he could not tell from Dr. Ryan's photograph whether McGuire was circumcised. McGuire argues that this testimony was patently irrelevant and highly prejudicial, and it should not have been admitted.

¶28 We conclude that the rebuttal evidence was neither cumulative nor irrelevant. The State offered the evidence about the position of the bed to rebut the evidence offered by Dr. Ryan. Further, the testimony of Dr. Dewire was not irrelevant, but rebutted Dr. Ryan's testimony that anyone would know whether a

man was circumcised. We conclude that the trial court properly exercised its discretion when it allowed this evidence.

¶29 We conclude that the circuit court properly denied McGuire's motion for postconviction relief. Consequently, and for the reasons stated, we affirm the judgment and order of the circuit court.

Judgment and order affirmed.

APPENDIX D

STATE OF WISCONSIN: CIRCUIT COURT
WALWORTH COUNTY

STATE OF WISCONSIN,

Plaintiff,

Hon. James L. Carlson
Case No. 2005CF80

v.

DONALD J. McGUIRE,

Defendant.

ORDER

For the reasons stated on the record on November 1, 2007, Fr. Donald J. McGuire's Motion for Post-Conviction Relief is DENIED.

Dated this 7th day of November, 2007.

/s/
Hon. James L. Carlson
Circuit Court Judge

APPENDIX E

STATE OF WISCONSIN: CIRCUIT COURT
WALWORTH COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

DONALD J. McGUIRE,

Defendant.

Hon. James L. Carlson
Case No. 2005CF80

Transcript of Post-Conviction Motion
Before the Honorable James L. Carlson
Circuit Court Branch II

November 1, 2007
Elkhorn, WI
APPEARANCES:
On behalf of the Plaintiff:
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District Attorney
Elkhorn, WI 53121
On behalf of the Defendant:
Robert R. Henak
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REPORTED BY: LORI L. UPTON

* * *

THE COURT: . . .

The next issue has to do with the tolling provision being constitutionally barred by the six-year limitation period under, one, privileges and immunities clause and, two, equal protection as applied and due. process as applied. I believe again there was nothing there that he was not clear about, so I'm just going to deny that motion for the following reasons, it was admitted that I -- it was admitted that straight out due process would require the state to show some bad-faith action by the state. I'm trying to remember the case that is cited for that, that you were looking to overturn that case.

MR. HENAK: Yes, Your Honor.

THE COURT: I'm sure I have got this here.

MR. KOSS: It is in Mr. Henak's reply.

MR. HENAK: That is State v. Wilson.

THE COURT: State v. Wilson.

MR. HENAK: And that we concede this Court has no power to grant our motion on that ground.

THE COURT: I feel bound by that precedence.